

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4678 OF 2009

Sanjay Devidasrao Paithane. .. Petitioner

Vs

State of Maharashtra and Another. .. Respondents

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Shri M.S. Topkar for the Petitioner.

Mrs.M.P. Thakur, AGP for Respondent No.1.

Shri D.D. Madon, Senior Advocate along with Shri Vishwajit S. Kapse
for Respondent No.2.

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CORAM : A.S. OKA & A.S.GADKARI, JJ

DATE ON WHICH SUBMISSIONS WERE HEARD : 24TH DECEMBER 2014

DATE ON WHICH JUDGMENT IS PRONOUNCED: 27TH FEBRUARY 2015

JUDGMENT (PER A.S. OKA, J)

. By this Writ Petition under Article 226 of the Constitution of India, essentially there is a challenge to the order dated 17th October 2008 passed by the State Government in exercise of powers under Clause (a)(i) of Sub-Rule (4) of Rule 10 of the Maharashtra Civil Services (Pension) Rules, 1982 (for short “the Pension Rules”). There are consequential prayers in relation to denial of promotion, non-grant of the benefit of the Assured Career Progression (for short “ACP”) and other reliefs.

2. The Petitioner was appointed on 18th June 1984 as a Civil Judge, Junior Division and Judicial Magistrate, First Class. In the year 1997, the Petitioner was promoted as a Civil Judge, Senior Division. On 1st September 2003, the Petitioner was appointed as In-charge Member Secretary of the Maharashtra State Legal Services Authority. He worked in the said capacity till 18th October 2004. Later on, he worked as the Deputy Secretary of the Maharashtra State Legal Services Authority till 31st December 2005.

3. The Petitioner was sent on deputation to Madras High Court by the Hon'ble the Chief Justice of this Court with effect from 1st February 2006. He was repatriated on 16th August 2007. On 17th October 2008, an order of compulsory retirement under Clause a(i) of Sub-Rule (4) of Rule 10 of the Pension Rules was passed against the Petitioner.

4. A representation against the impugned order was made by the Petitioner to this Court on 2nd August 2010. It appears that a learned Judge of this Court was appointed to look into the representation of the Petitioner. A report was submitted by the learned Judge positively recommending the representation. The Special Review Committee of this Court in its meeting held on 23rd August 2010

decided to accept the report of the learned Judge of this Court. The Committee resolved that the Registry shall make an appropriate statement before a Division Bench of this Court before which the present Petition was pending. However, in a meeting dated 22nd March 2011 of the Committee of the Administrative Judges which was also the Review Committee, it was resolved to reject the representation made by the Petitioner. But, on 31st July 2013, the Administrative Committee of this Court passed a Resolution deciding to reinstate the Petitioner.

5. The said decision was placed before this Court on 13th August 2013. This Court observed that the challenge to the impugned order in terms of prayer clause (a) was substantially worked out. As regards the other prayers, Rule was issued.

6. On 31st January 2014, the State Government passed an order directing reinstatement of the Petitioner in the judicial service from the date on which the Petitioner reports to the duty. It was directed that the period from 17th October 2008 till the date of the reinstatement of the Petitioner shall be treated as the period on duty. It was also directed that the leave admissible to the Petitioner shall be credited to his account and that the Petitioner is entitled to the benefit of increments as per the Rules.

7. The learned counsel appearing for the Petitioner submitted that the Petitioner is entitled to back wages as the order of the compulsory retirement has been recalled. He pointed out that by a Notification dated 3rd February 2007, the Petitioner was appointed as an Ad hoc Additional District Judge from the date on which he is given posting by this Court. A copy of the said Notification has been annexed to the additional affidavit of the Petitioner dated 18th December 2014. The learned counsel appearing for the Petitioner submitted that the Petitioner is entitled to continuity of service. He urged that the Petitioner is entitled to salary and benefits admissible to the post of Ad hoc Additional District Judge. The learned counsel appearing for the Petitioner submitted that the Petitioner was entitled to the benefit of Assured Career Progression (ACP) at two stages while he was a Civil Judge, Junior Division. He urged that the Petitioner was also entitled to the benefit of ACP at two stages while he was a Civil Judge, Senior Division. He urged that contrary to the service record of the Petitioner, he has been denied benefit of the ACPs. He submitted that though the Petitioner was reinstated, he has been denied benefit of back wages. On the aspect of the back wages, he urged that though after the order of compulsory retirement, the Petitioner reverted back to practice in law, due to various reasons and constraints, the Petitioner's income was meager. He urged that the Petitioner could not prosper in legal profession as he re-joined the same after a long gap. He pointed out

that the Petitioner on the basis of an order of reinstatement was posted as the Judge of the Labour Court, Mumbai, by an order dated 28th February 2014. Accordingly, he resumed duties on 29th March 2014. He stated that the Petitioner issued a notice dated 15th April 2014 opting for voluntary retirement. The same was accepted and the Petitioner was relieved from 15th July 2014. He urged that the Petitioner is entitled to receive all the monetary benefits with interest. He relied upon a decision of the Apex Court in the case of Union of India v. K.V. Jankiraman¹. The learned senior counsel representing the High Court Administration urged that the Petitioner is dis-entitled to back wages as, after the order of compulsory retirement, he has admittedly received the pension. He urged that even otherwise, the Petitioner was practicing law and, therefore, he is dis-entitled to the said benefit. He urged that though the Petitioner was selected for the post of Ad hoc Additional District Judge on 3rd February 2007, he was never given posting to the said post. He urged that under the relevant Rules, appointment of judicial officers to the post of Ad hoc Additional District Judge is purely temporary for a period of two years and is liable to be terminated at any time without any notice. He urged that no right is created in favour of the Petitioner by such appointment. As regards the denial of the ACPs, he has placed on record the relevant Rules as well as minutes showing consideration of the case of the Petitioner for grant of ACPs. He urged that the Petitioner is not entitled

1 (1991)4 SCC 109

to the benefits. The learned counsel appearing for the Petitioner did not dispute that after the order of compulsory retirement, the Petitioner had received pension. He submitted that though the Petitioner is entitled to full back wages, the pension amount already received by him may be taken into consideration. He submitted that in any event, this Court can always grant a part of the back wages.

8. We have considered the submissions. As stated earlier, on the basis of the recommendation of the Administrative Committee of this Court in its meeting dated 31st July 2013, by an order dated 31st January 2014, the Petitioner was reinstated. Even going by the order of reinstatement dated 31st January 2014, the Petitioner is entitled to the benefit of continuity of service and all admissible increments. The said order also directs that admissible leave be credited to his leave account. Even the period from the date of compulsory retirement till 29th March 2014 when the Petitioner resumed duty was ordered to be treated as the period on duty.

9. There are three questions which arise for consideration. The same are as under:

- (i) Whether the Petitioner is entitled to salary admissible to the post of Ad hoc Additional District Judge?

(ii) Whether the Petitioner is entitled to the benefit of Assured Career Progression scheme at four stages ?

(iii) Whether the Petitioner is entitled to back wages ?

10. Along with the additional affidavit, the Petitioner has annexed a copy of the order dated 3rd February 2007 by which the Petitioner was appointed as an Ad hoc Additional District Judge. The relevant part of the said order reads thus:

“In exercise of the powers conferred by proviso to article 309 read with 233 and 235 of the Constitution of India, the Government of Maharashtra after consultation with the Hon'ble High Court of Judicature at Bombay, is hereby pleased to make the appointment of the following Judicial Officers, as ad-hoc Additional District Judges, (with effect from the date on which the High Court gives him posting) until further orders subject to rules for ad-hoc appointments of Judicial Officers in the State of Maharashtra for implementing the Special Scheme, for elimination of arrears (sponsored by the Central Government) extended upto April 2010”.

11. The name of the Petitioner appears in the said order. It is not disputed before us that the scheme of appointment of Ad hoc District Judges was continued thereafter and even the said scheme is in existence as of today.

12. When the said order dated 3rd February 2007 was passed, the Petitioner was on deputation to the Madras High Court. The period of deputation came to an end on 16th August 2007. The Petitioner was not given posting as an Ad hoc Additional District Judge till the impugned order of compulsory retirement dated 17th October 2008 was passed. It is pointed out in the additional affidavit that some of the judicial officers appointed under the order dated 3rd February 2007 were given posting on 28th February 2007 when the Petitioner was on deputation. A copy of the relevant order was annexed to the said affidavit. After the Petitioner was repatriated on the completion of the period of deputation, the Petitioner was not given a posting on the post of Ad hoc Additional District Judge. There is no reason forthcoming in the affidavit-in-reply filed by the Registry (Legal) as to why the Petitioner was not posted as an Ad hoc Additional District Judge. It is not the case made out that the Petitioner's appointment under the order dated 3rd February 2007 was revoked. We must note here that the order of compulsory retirement of the Petitioner has been withdrawn on the recommendation of this Court. The other Judicial Officers appointed under the said order were given postings. Therefore, there is a merit in the contention of the Petitioner that he was entitled to posting as an Ad hoc Additional District Judge on the basis of the order dated 3rd February 2007. However, till the date of the impugned order of compulsory retirement, the Petitioner never made any grievance

regarding denial of the post of Ad hoc Additional District Judge. Therefore, in our view, the Petitioner is entitled to the pay and allowances admissible to the post of Ad hoc Additional District Judge from the date of order of his reinstatement till the date on which the Petitioner voluntarily retired from the service.

13. As far as back wages are concerned, the Petitioner has not disputed in his additional affidavit dated 18th December 2014 that from the year 2009 till the date of his reinstatement that he was practicing as an Advocate. His contention is that his earning was meager. However, it is an admitted position that the Petitioner received pension on the basis of the order of compulsory retirement. Moreover, the Petitioner has earned some income from the profession. Considering this income, the Petitioner is entitled to only a part of the back wages. The pension payable to him on the basis of the impugned order till the date of the reinstatement can be treated as the back wages payable to him. As the Petitioner has received the pension for the said period, no case is made out for grant of back wages subject to a clarification that no recovery of the amount paid towards the pension shall be made from the Petitioner and that the same shall not be adjusted towards the pension payable to him after his voluntary retirement.

14. The other issue which survives for consideration is denial of benefit of the ACP. In the meeting held on 24th August 2002 of a Committee of four Judges of this Court, norms/guidelines for grant of ACP in terms of the report of the Shetty Commission have been finalized. From the additional compilation filed on record by the learned senior counsel representing the High Court Administration, it appears that firstly, the case of the Petitioner for grant of benefit of ACP was considered for the year 1996 in the month of October/November 2003 and the Petitioner was held as not qualified on the ground of inadequate disposal and SID record. His case for benefit of first ACP in the cadre of Civil Judge, Senior Division was considered in June 2006 and he was denied the benefit due to inadequate disposal. The Petitioner was in service till 17th October 2008. The Petitioner never made any grievance regarding the denial of the aforesaid ACPs to him. Only in this Petition filed in May 2009, a grievance regarding the denial of the aforesaid ACPs is sought to be made very belatedly. As far as the benefit of the second ACP in the cadre of Civil Judge, Senior Division is concerned, the case of the Petitioner was considered in October 2009. The Hon'ble the Chief Justice accepted the suggestion of the Registry to deny the benefit of ACP to the Petitioner. The date of the order of the Hon'ble Chief Justice is 16th October 2009. Though the prayer made by the Petitioner for grant of ACP for the earlier period cannot be considered because of the gross delay on the part of the Petitioner in

making a grievance about it, the prayer of the Petitioner to the extent of denial of benefit of second ACP in the cadre of the Civil Judge Senior Division will have to be considered. By an order dated 16th October 2009, the Petitioner has been denied the benefit of the said ACP. A chart appended to the note of the Registry placed before the Hon'ble Chief Justice shows that the ACP was denied to the Petitioner on the ground of inadequate disposal and the impugned order compulsory retirement. It is necessary to consider the rules governing grant of ACP. Even under the guidelines framed by the Committee of Judges, it is provided that the ACP-II shall be applied to those officers who have the ratings of not less than "Good" in their confidential reports. Sub-Rule (5) of Rule 3 of the Maharashtra Judicial Service Rules, 2008 provides that the second ACP can be granted provided the performance of a judicial officer as reflected in the confidential reports is not less than "Good" for a continuous period of five years commencing from any year after he gets the first ACP. Proviso to the said Sub-Rule lays down that if average disposal for more than one year within the span of five years is found to be inadequate, the judicial officer is disentitled to ACP-II. From the note of the Registry which was placed before the Hon'ble the Chief Justice on the administrative side, it appears that the record for the period from the year 2000 till 10th November 2005 was considered. The grading of the Petitioner was always "Good" during the said period. The ACR for the period from 9th January 2006 to 31st March 2006 and

the ACR for the period from 2007 were not available. The grading in the year 2008 is again "Good". When the case of the Petitioner was considered, during the immediately preceding five years, only once that the disposal of the Petitioner was shown as inadequate. Therefore, the Petitioner could not have been denied ACP-II on the basis of the inadequate disposal. The only other ground for denying the ACP was the impugned order of compulsory retirement which has been now withdrawn. Therefore, the Petitioner was entitled to the benefit of ACP-II in the cadre of the Civil Judge Senior Division.

15. Hence, the Petition must succeed in part and we pass the following order:

ORDER :

- (a) We clarify that on the reinstatement of the Petitioner under the order dated 31st January 2014, he is entitled to the benefit of continuity of service and all other consequential benefits including the benefits which are already provided under the order dated 31st January 2014;

- (b) We direct that the Petitioner will be entitled to the pay and allowances admissible to the post of Ad hoc Additional District Judge with effect from 1st February 2014 till the date on which he voluntarily retired;
- (c) It is obvious that the Petitioner is entitled to all increments admissible in accordance with law;
- (d) Fixation of pension shall be made on the footing that on the date of voluntary retirement, the Petitioner was holding the post of Ad hoc Additional District Judge;
- (e) The Petitioner will be entitled to the benefit of Assured Career Progression-II of the post of Civil Judge, Senior Division;
- (f) The prayer for grant of the benefit of ACPs for the earlier period is rejected;
- (g) The prayer for grant of back wages is rejected subject to clarification that the pension amount

received by the Petitioner from the date of the order of compulsory retirement till the reinstatement shall not be recovered from him;

- (h) All the amounts payable by virtue of the this Judgment and order including the amount payable on account of grant of ACP-II shall be paid to the Petitioner by the State Government within a period of six months from today;
- (i) On failure to make payment of the said amounts to the Petitioner within the stipulated period of six months from today, the said amounts shall carry an interest at the rate of 8% per annum from the date of this Judgment till the date on which the amounts are actually paid;
- (j) The Rule is made partly absolute on above terms with no order as to costs.

(A.S.GADKARI, J)

(A.S. OKA, J)